

CASE NO. A-21-737

IN THE NEBRASKA COURT OF APPEALS

SUZETTE KANE,
Appellant / Plaintiff,

v.

SHAUNA KANE and MICHAEL LEONARD,
Appellees / Defendants.

APPEAL FROM THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA

HONORABLE SUSAN STRONG

District Court Judge

BRIEF OF APPELLANT

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STATUTES

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Neb. Rev. Stat. § 25-1902 (Cum. Supp. 2020)

Neb. Rev. Stat. § 25-1911 (Cum. Supp. 2020)

Neb. Rev. Stat. § 43-1801 (Reissue 2016)

Neb. Ct. R. Pldg. § 6-1112

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV

Neb. Const. Article I, § 3

STATEMENT OF JURISDICTION

The Order of Dismissal by the Honorable Susan Strong filed September 9, 2021 (T21–27) is a final, appealable order affecting substantial rights of the parties and determining the action. Neb. Rev. Stat. §§ 25-1902, 25-1911 (Cum. Supp. 2020). The Notice of Appeal and docket fee were filed by Appellant Suzette Kane on September 12, 2021.

STATEMENT OF THE CASE

1. Nature of the Case

Appellant filed a Petition to Establish Grandparent Visitation (the “Petition”) on July 9, 2021. (T1–3). Appellees Shauna Kane and Michael Leonard (collectively, “Appellees”) filed a Motion to Dismiss on July 20, 2021. (T10–14). The District Court entered an Order of Dismissal sustaining Appellees’ Motion to Dismiss and dismissing Appellant’s Petition with prejudice for lack of subject matter jurisdiction on September 9, 2021. (T21–27). Appellant appeals the Order of Dismissal entered by the District Court on September 9, 2021. (T21–27).

2. Issues Tried by the District Court

The District Court determined whether Appellant’s Petition should be dismissed based on whether Neb. Rev. Stat. § 43-1801 (Reissue 2016) *et. seq.* (the “Nebraska grandparent visitation statutes”), as applied to the present case, are constitutional under the Fourteenth Amendment of the U.S. Constitution. (T21–27). The District Court was presented with, but did not decide, the issue of whether Appellant’s Petition should be dismissed for failure to state a claim upon which relief can be granted. (T21–27).

3. How the Issues Were Decided

The District Court found that the Nebraska grandparent visitation statutes, as applied to the present case, are unconstitutional under the Fourteenth Amendment of the U.S. Constitution. (T21–27). The District Court entered an Order of Dismissal sustaining Appellees’ Motion to Dismiss and dismissing Appellant’s Petition with prejudice “for lack of subject matter jurisdiction.” (T21–27). The District Court did not decide whether Appellant’s Petition should be dismissed for failure to state a claim upon which relief can be granted. (T21–27).

4. Standard of Review

Whether a statute is constitutional is a question of law; accordingly, an appellate court is obligated to reach a conclusion independent of the decision reached by the court below. *Hamit v. Hamit*, 271 Neb. 659, 715 N.W.2d 512 (2006). As explained in detail below, the District Court’s Order of Dismissal should be treated as an order granting summary judgment in favor of Appellees; in reviewing an order granting summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence. *Corona de Camargo v. Schon*, 278 Neb. 1045, 776 N.W.2d 1 (2009).

ASSIGNMENT OF ERRORS

1. The District Court erred in dismissing appellant’s Petition to Establish Grandparent Visitation.

PROPOSITIONS OF LAW

1. Whether a statute is constitutional is a question of law; accordingly, an appellate court is obligated to reach a conclusion independent of the decision reached by the court below. *Hamit v. Hamit*, 271 Neb. 659, 715 N.W.2d 512 (2006).

2. In reviewing an order granting summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence. *Corona de Camargo v. Schon*, 278 Neb. 1045, 776 N.W.2d 1 (2009).

3. When parties present evidence outside of the pleadings and the trial court accepts such evidence, a pending motion to dismiss is converted to a motion for summary judgment. Neb. Ct. R. Pldg. § 6-1112(b); *Corona de Camargo v. Schon*, 278 Neb. 1045, 776 N.W.2d 1 (2009); *Nebraska Coalition for Ed. Equity v. Heineman*, 273 Neb. 531, 731 N.W.2d 164 (2007).

4. Before they can be considered by a trial court, documents must be admitted into evidence and testimony must be given under oath. *Richards v. McClure*, 290 Neb. 124, 132, 858 N.W.2d 841, 848 (2015). When the trial record is deficient through no fault of the appellant, an appellate court will remand for a new trial if the deficiency in the record prevents the appellate court from providing the appellant meaningful appellate review of the assignments of error. *Provident Trust Co. v. Radford (In re Estate of Radford)*, 297 Neb. 748, 901 N.W.2d 261 (2017). When an appellant argues on appeal that the evidence is insufficient on a point for which the appellee bore the burden of proof, an appellate court will not presume there was evidence before the lower court, when the bill of exceptions indicates that no such evidence was offered. *Id.*

5. Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved. *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016).

6. Neb. Rev. Stat. § 43-1801(1) (Reissue 2016) states that “a grandparent seeking visitation shall file a petition in the district court in the county in which the minor child resides.” The Nebraska Supreme Court has expressly stated that the grandparent visitation statutes “generally place [] jurisdiction in the district court.” *Ponseigo v. Mary W.*, 267 Neb. 72, 672 N.W.2d 36 (2003).

7. There do not appear to be any published cases in which a court has found that it lacks subject matter jurisdiction simply because it would be unconstitutional for the court to grant the relief sought. To the contrary, a claim that a statute is unconstitutional “does not implicate a court’s subject matter jurisdiction.” *United States v. De Vaughn*, 694 F.3d 1141 (10th Cir. 2012). The U.S. Supreme Court has held that a court has jurisdiction even when it or a higher court later determines the statute under which the case is brought is unconstitutional. *United States v. Williams*, 341 U.S. 58 (1951) (“Though the trial court or an appellate court may conclude that the statute is wholly unconstitutional . . . it has proceeded with jurisdiction”).

8. Pursuant to Neb. Rev. Stat. § 43-1801 *et. seq.*, a grandparent may seek visitation with a minor grandchild if the marriage of the child’s parents has been dissolved or petition for the dissolution of such marriage has been filed and is still pending, when the child’s parents are deceased, or when the parents of the minor child have never been married but paternity has been legally established. A court may order grandparent visitation if the petitioning grandparent proves

by clear and convincing evidence that: (1) There is, or has been, a significant beneficial relationship between the grandparent and the child; (2) It is in the best interests of the child that such relationship continue; and (3) Such visitation will not adversely interfere with the parent-child relationship. Neb. Rev. Stat. § 43-1801 *et. seq.*

9. The Nebraska Supreme Court has previously held that, under *Troxel v. Granville*, the Nebraska grandparent visitation statutes are not facially unconstitutional under either the Fourteenth Amendment of the U.S. Constitution or Article I, § 3 of the Nebraska Constitution. *Hamit v. Hamit*, 271 Neb. 659, 715 N.W.2d 512 (2006).

10. The Supreme Court in *Troxel v. Granville* did not define a specific test by which to evaluate the constitutionality of nonparent visitation statutes. 530 U.S. 57 (2000). However, in *Hamit v. Hamit*, the Nebraska Supreme Court explained that there are three principles which guide a court's analysis of whether a nonparent visitation statute, as applied, unconstitutionally infringes upon a parent's due process rights:

- (1) There is a presumption that fit parents act in the best interests of their children.
- (2) In light of this presumption, a fit parent's decision concerning the denial of grandparent visitation must be accorded at least some special weight.
- (3) Notwithstanding the special weight to be accorded a fit parent's decision, the presumption in favor of fit parents is rebuttable under the appropriate circumstances.

271 Neb. 659, 715 N.W.2d 512 (2006).

11. Under *Hamit v. Hamit*, a trial court's award of visitation to grandparents will be

constitutional so long as the court properly finds that the grandparents have proven each element of the Nebraska grandparent visitation statutes by clear and convincing evidence. 271 Neb. 659, 715 N.W.2d 512 (2006).

12. There does not appear to be a single published Nebraska case where the grandparent visitation statutes have been found to be unconstitutional as applied.

13. In *Lulay v. Lulay*, 739 N.E.2d 521 (Ill. 2000), the Illinois Supreme Court held that the nonparent visitation statute at issue was unconstitutional as applied where a grandmother petitioned for visitation of the minor children, whose parents were divorced, shared joint custody of the children, and both opposed the grandmother's proposed visitation. Unlike the Nebraska statutes, the Illinois nonparent visitation statute at issue in *Lulay* allowed persons other than grandparents to seek visitation, did not require a showing that a significant beneficial relationship exists between the grandparent and the child(ren), and did not require a showing that nonparent visitation will not adversely interfere with the parent-child relationship—all factors which the Nebraska Supreme Court found to be essential in upholding the constitutionality of the Nebraska statutes in *Hamit*.

14. The Illinois nonparent visitation statute was struck down altogether as facially unconstitutional shortly after the *Lulay* decision. *Wickham v. Byrne*, 769 N.E.2d 1 (Ill. 2002).

15. In the Alabama case of *Ex parte E.R.G.*, the Alabama Supreme Court declared the entire nonparent statute at issue facially unconstitutional; the facts of the *E.R.G.* case are thus irrelevant because the court held that there was no possible factual scenario where the statute would be constitutional. 73 So. 3d 634 (Ala. 2011).

16. The Iowa Supreme Court in *Santi v. Santi* emphasized that its decision was based on the critical fact that the children’s parents were married and that the children came from “an intact nuclear family.” 633 N.W.2d 312, 321 (Iowa 2001).

17. The Oklahoma Supreme Court (prior to *Troxel*) emphasized in *Herbst v. Sayre (In re Herbst)* the importance of the facts that the children’s parents were married and had “an intact nuclear family,” and that the petitioning grandparent relied only on a “vague generalization about the positive influence many grandparents have upon their grandchildren.” 971 P.2d 395 (Okla. 1998).

18. The Florida Supreme Court (prior to *Troxel*) in *Beagle v. Beagle* explained the importance of the fact that the minor children came from an “intact family,” and found the Florida nonparent visitation statute to be facially unconstitutional even where only one parent objects to grandparent visitation. 678 So. 2d 1271 (Fla. 1996).

STATEMENT OF FACTS

Appellee Shauna Kane (“Shauna”) is the biological mother of Cameron Michael Leonard (born in 2012), Vivian Iva Leonard (born in 2014), and Mason Anthony Leonard (born in 2018) (collectively, the “minor children”). (T1). Appellee Michael Leonard (“Michael”) is the biological father of the minor children. (T1). Appellant Suzette Kane (“Appellant” or “Suzette”) is the biological mother of Shauna, and thus also the biological maternal grandmother of the minor children. (T1). Shauna and Michael were legally married until August 12, 2019, when the District Court of Lancaster County, Nebraska, entered a Decree of Dissolution of Marriage in Case No. CI

18-2297. (T1). Pursuant to the divorce decree, Shauna was granted primary physical and legal custody of the minor children, subject to Michael's reasonable rights of parenting time. (T10).

Suzette has always had a strong relationship with the minor children; however, Shauna has denied Suzette any in-person visitation with the minor children since November 2020. (E4, 1:9-10, 46). She visited them often, always staying with Shauna and the children in Shauna's home. (E4, 1:9-10, 46). The minor children have been to visit Suzette a number of times, and Shauna brought the minor children to stay with Suzette when Shauna left Michael. (E4, 1:9-10, 46). Suzette would babysit the minor children any time Shauna asked her to, and would take the children to and from school and daycare. (E4, 1:9-10, 46). Suzette would provide the children with whatever they needed, such as food, clothing, and a place to live. (E4, 1-2:9-10, 46). Shauna has asked Suzette on multiple occasions to help her with the minor children, which Suzette did, even leading Suzette to secure part-time employment in Lincoln because she was visiting so frequently. (E4, 2:9-10, 46). Suzette has never put the minor children in harm's way, has never been physically violent to anyone, does not utilize physical discipline, and has never spoken badly about either of the children's parents to the children. (E4, 2:9-10, 46). In her affidavit which was accepted into evidence, Suzette stated that she believes it is necessary for the District Court to enter an order for visitation so that the minor children can maintain their relationship with their grandmother. (E4, 2:9-10, 46).

On July 9, 2021, Suzette filed a Petition requesting that the District Court establish visitation rights granting Suzette regular visitation with the minor children, the exchange of information between Suzette and Appellees concerning the minor children, and a requirement that

Appellees obtain the court's permission prior to removing the minor children from the state of Nebraska. (T1–T2). Appellees then filed a “Motion to Dismiss” moving the District Court to dismiss Suzette’s Petition “pursuant to Neb. Ct. R. Pldg. § 6-1112(1) [sic] and Neb. Ct. R. Pldg. § 6-1112(6) [sic].” (T10). In their motion, Appellees alleged that they both objected to Suzette having any visitation or contact with the minor children. (T11). Appellees further alleged that allowing Suzette to have grandparent visitation pursuant to the Nebraska grandparent visitation statutes “over the opposition and objection of the [Appellees]” would unconstitutionally “infringe [] on the [Appellees’] liberty interests in raising their children” under the Fourteenth Amendment to the U.S. Constitution. (T11).

Shauna and Michael each submitted an affidavit in support of the motion stating their opposition to the visitation sought by Suzette. (T25). The District Court held a hearing on Appellee’s Motion to Dismiss on August 27, 2021, at which evidence was adduced by the parties. (T21).

On September 9, 2021, the District Court entered an Order of Dismissal sustaining Appellees’ Motion to Dismiss and dismissing Appellant’s Petition with prejudice “for lack of subject matter jurisdiction.” (T21–27). The District Court did not decide whether Appellant’s Petition should be dismissed for failure to state a claim upon which relief can be granted. (T21–27). The District Court found that the Nebraska grandparent visitation statutes, as applied to the present case, are unconstitutional under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. (T21–27). In its Order, the District Court noted that it was undisputed that the Nebraska Supreme Court has held that the Nebraska grandparent visitation statutes are facially

constitutional, and that courts in all subsequent published Nebraska cases have found the grandparent visitation statutes constitutional as applied. (T24). However, the District Court cited case law from other states in support of its conclusion that “as applied in this case, the grandparent visitation statute is an unconstitutional infringement on the [Appellees’] fundamental liberty interest in raising their children.” (T24–26). After finding the Nebraska grandparent visitation statutes unconstitutional as applied, the District Court’s Order stated: “It is therefore ORDERED that Defendants’ Motion to Dismiss is SUSTAINED. Plaintiff’s Complaint is dismissed with prejudice for lack of subject matter jurisdiction.” (T26) (emphasis in original).

In issuing its Order, the District Court relied on evidence which was not offered by the parties or accepted into the record, including court records from separate court cases. (T25). Specifically, the court explained that Shauna had obtained protection orders on behalf of herself and the minor children against Suzette in “Lancaster District Court Case Nos. CI 21-2817, CI 21-2975, CI 21-2976, & CI 21-2977.” (T25). The court also cited and quoted court records from Appellees’ divorce case. (T25). None of the parties offered these records from other court cases. Because these records from other court cases were not individually marked or introduced into evidence, they are not part of the record on appeal.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING APPELLANT’S PETITION TO ESTABLISH GRANDPARENT VISITATION.

The District Court erred in dismissing Appellant's Petition to Establish Grandparent Visitation. As an initial matter, Appellees' "Motion to Dismiss" should have been treated as a motion for summary judgment because matters outside of the pleadings were presented by Appellees and accepted by the District Court. In dismissing Appellant's Petition, the District Court improperly considered facts not in evidence. Further, there was no subject matter jurisdiction basis for the District Court to dismiss Appellant's Petition. Finally, the District Court failed to properly apply precedent from Nebraska courts as well as the U.S. Supreme Court in concluding that the Nebraska grandparent visitation statutes are unconstitutional as applied. Accordingly, this Court should reverse the District Court's Order of Dismissal and remand this matter for further proceedings.

Although there are several procedural grounds for reversal of the District Court's Order, Appellant respectfully requests that this Court reach and determine the question of whether the Nebraska grandparent visitation statutes are constitutional as applied in the present case. It is not in the interests of judicial economy to remand this case on procedural grounds without reaching the merits of the constitutionality of the grandparent visitation statutes. In such an event, Appellant has every reason to believe that the District Court will once again improperly conclude that the Nebraska grandparent visitation statutes are unconstitutional as applied, in which case Appellant will be required to appeal that determination yet again. To promote the interests of judicial economy and to minimize the length of time which Appellant is deprived of a meaningful relationship with her grandchildren, Appellant respectfully requests that this Court reach and

determine the question of whether the Nebraska grandparent visitation statutes are constitutional as applied in the present case.

A. The District Court Erred in Treating Appellees’ Motion as a Motion to Dismiss Instead of a Motion for Summary Judgment.

As an initial matter, the District Court and the parties erroneously treated Appellees’ “Motion to Dismiss” as a motion to dismiss pursuant to Neb. Ct. R. Pldg. § 6-1112(b). Instead, Appellees’ “Motion to Dismiss” should have been treated as a motion for summary judgment because matters outside of the pleadings were presented by Appellees and accepted by the District Court. When parties present evidence outside of the pleadings and the trial court accepts such evidence, a pending motion to dismiss is converted to a motion for summary judgment. Neb. Ct. R. Pldg. § 6-1112(b); *Corona de Camargo v. Schon*, 278 Neb. 1045, 776 N.W.2d 1 (2009); *Nebraska Coalition for Ed. Equity v. Heineman*, 273 Neb. 531, 731 N.W.2d 164 (2007).

In the present case, Appellees filed a “Motion to Dismiss” moving the District Court to dismiss Appellant’s Petition “pursuant to Neb. Ct. R. Pldg. § 6-1112(1) [sic] and Neb. Ct. R. Pldg. § 6-1112(6) [sic].” (T10). Shauna, Michael, and Suzette each submitted affidavits which were accepted into evidence. As such, Appellees’ “Motion to Dismiss” was converted to a motion for summary judgment. For purposes of this appeal, Appellees’ “Motion to Dismiss” should be treated as a motion for summary judgment, and the District Court’s Order of Dismissal should be treated as an order granting summary judgment in favor of Appellees.

B. The District Court Erred in Considering Facts Not in Evidence.

Regardless of whether Appellees' motion is characterized as a motion to dismiss or a motion for summary judgment, the District Court improperly considered facts not in evidence. Before they can be considered by a trial court, documents must be admitted into evidence and testimony must be given under oath. *Richards v. McClure*, 290 Neb. 124, 132, 858 N.W.2d 841, 848 (2015). When the trial record is deficient through no fault of the appellant, an appellate court will remand for a new trial if the deficiency in the record prevents the appellate court from providing the appellant meaningful appellate review of the assignments of error. *Provident Trust Co. v. Radford (In re Estate of Radford)*, 297 Neb. 748, 901 N.W.2d 261 (2017). When an appellant argues on appeal that the evidence is insufficient on a point for which the appellee bore the burden of proof, an appellate court will not presume there was evidence before the lower court, when the bill of exceptions indicates that no such evidence was offered. *Id.*

In *Provident Trust Co. v. Radford (In re Estate of Radford)*, the trial court ruled in favor of the moving party, but did not receive any exhibits into evidence or have any witnesses testify under oath. *Id.* Instead, the trial court stated that it would "take judicial notice of the record," and in its order stated that the court was "advised that the facts are not in dispute." *Id.* However, the court did not individually mark and introduce into evidence the documents it considered to be part of the record. *Id.* The Nebraska Supreme Court reversed and remanded for a new hearing because the transcript was insufficient to support the trial court's judgment. *Id.* The Nebraska Supreme Court explained that the court "should have identified what it considered to be 'the record' by individually marking and introducing into evidence each document that it considered relevant and

competent,” and that because these steps were not taken, “no evidence has been preserved in the record for appellate review.” *Id.*

As explained in detail above, in the present case the District Court relied on records which were not offered by the parties or accepted into evidence, including court records from separate court cases. (T25). Because these records were not accepted into evidence, it was improper for the District Court to consider them in issuing its Order. Further, because the records relied on by the District Court were not individually marked and introduced into evidence, this evidence has not been preserved in the record for appellate review through no fault of Appellant. Because Appellees, as the moving parties, had the burden of proof, and because the bill of exceptions indicates that the records relied upon by the District Court were not offered into evidence, it cannot be presumed that such evidence was before the District Court. There is thus an insufficient trial record for an appellate court to provide meaningful review, and the case should be reversed and remanded.

C. The District Court Erred in Dismissing Appellant’s Petition for Lack of Subject Matter Jurisdiction.

There was no subject matter jurisdiction basis for the District Court to dismiss Appellant’s Petition. The District Court sustained Appellees’ Motion to Dismiss and dismissed Appellant’s Petition “for lack of subject matter jurisdiction.” (T21–27). The District Court did not provide any basis for why it lacked subject matter jurisdiction other than its conclusion that the Nebraska grandparent visitation statutes are unconstitutional as applied. (T21–27). After finding the Nebraska grandparent visitation statutes unconstitutional as applied, and after explaining that it did not decide whether Appellant’s Petition should be dismissed for failure to state a claim upon

which relief can be granted, the District Court’s Order stated: “It is therefore ORDERED that Defendants’ Motion to Dismiss is SUSTAINED. Plaintiff’s Complaint is dismissed with prejudice for lack of subject matter jurisdiction.” (T26) (emphasis in original). The District Court did not elaborate on how the supposed unconstitutionality of the statutes could have deprived the court of subject matter jurisdiction.

Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved. *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016). Neb. Rev. Stat. § 43-1801(1) (Reissue 2016) states that “a grandparent seeking visitation shall file a petition in the district court in the county in which the minor child resides.” The Nebraska Supreme Court has expressly stated that the grandparent visitation statutes “generally place [] jurisdiction in the district court.” *Ponseigo v. Mary W.*, 267 Neb. 72, 672 N.W.2d 36 (2003).

There do not appear to be any published cases in which a court has found that it lacks subject matter jurisdiction simply because it would be unconstitutional for the court to grant the relief sought. To the contrary, a claim that a statute is unconstitutional “does not implicate a court’s subject matter jurisdiction.” *United States v. De Vaughn*, 694 F.3d 1141 (10th Cir. 2012). The U.S. Supreme Court has held that a court has jurisdiction even when it or a higher court later determines the statute under which the case is brought is unconstitutional. *United States v. Williams*, 341 U.S. 58 (1951) (“Though the trial court or an appellate court may conclude that the statute is wholly unconstitutional . . . it has proceeded with jurisdiction”).

It is conceivable that a court could properly dismiss an action for failure to state a claim upon which relief may be granted under Neb. Ct. R. Pldg. § 6-1112(b)(6) where the pleadings request relief which is plainly unconstitutional. However, the District Court in the present case did not decide the issue of whether Appellant's Petition should be dismissed for failure to state a claim upon which relief can be granted. (T21–27). Because the constitutionality of the Nebraska grandparent visitation statutes did not implicate the court's subject matter jurisdiction, the District Court erred in dismissing Appellant's Petition for lack of subject matter jurisdiction.

D. The District Court Erred in Concluding that the Nebraska Grandparent Visitation Statutes Are Unconstitutional as Applied.

The District Court erred in concluding that the Nebraska grandparent visitation statutes are unconstitutional as applied. Pursuant to Neb. Rev. Stat. § 43-1801 *et. seq.*, a grandparent may seek visitation with a minor grandchild if the marriage of the child's parents has been dissolved or petition for the dissolution of such marriage has been filed and is still pending, when the child's parents are deceased, or when the parents of the minor child have never been married but paternity has been legally established. A court may order grandparent visitation if the petitioning grandparent proves by clear and convincing evidence that: (1) There is, or has been, a significant beneficial relationship between the grandparent and the child; (2) It is in the best interests of the child that such relationship continue; and (3) Such visitation will not adversely interfere with the parent-child relationship. Neb. Rev. Stat. § 43-1801 *et. seq.*

In *Troxel v. Granville*, the U.S. Supreme Court concluded that a Washington nonparent visitation statute, as applied, violated a mother's Fourteenth Amendment substantive due process

rights in the care, custody, and control of her children. 530 U.S. 57 (2000). The Nebraska Supreme Court has previously held that, under *Troxel v. Granville*, the Nebraska grandparent visitation statutes are not facially unconstitutional under either the Fourteenth Amendment of the U.S. Constitution or Article I, § 3 of the Nebraska Constitution. *Hamit v. Hamit*, 271 Neb. 659, 715 N.W.2d 512 (2006).

The Supreme Court in *Troxel v. Granville* did not define a specific test by which to evaluate the constitutionality of nonparent visitation statutes. 530 U.S. 57 (2000). However, in *Hamit v. Hamit*, the Nebraska Supreme Court explained that there are three principles which guide a court's analysis of whether a nonparent visitation statute, as applied, unconstitutionally infringes upon a parent's due process rights:

- (1) There is a presumption that fit parents act in the best interests of their children.
- (2) In light of this presumption, a fit parent's decision concerning the denial of grandparent visitation must be accorded at least some special weight.
- (3) Notwithstanding the special weight to be accorded a fit parent's decision, the presumption in favor of fit parents is rebuttable under the appropriate circumstances.

271 Neb. 659, 715 N.W.2d 512 (2006).

In *Hamit*, the Nebraska Supreme Court rejected the appellant-mother's argument that the grandparent visitation statutes were unconstitutional as applied in her case. *Id.* In that case, the paternal grandparents of the minor children sought grandparent visitation after the children's father (the grandparents' son) died and the children's mother refused the grandparents' requests for

visitation. *Id.* The Nebraska Supreme Court explained that the Nebraska grandparent visitation statutes passed strict scrutiny under *Troxel v. Granville* because they honored the presumption that fit parents act in the best interests of their children, provided special weight to the parent's decision concerning the denial of grandparent visitation, and properly allowed challenging grandparents to rebut the presumption that the parent's denial of visitation is in the children's best interests. *Id.*

In *Hamit*, the trial court found by clear and convincing evidence that there was a significant beneficial relationship between the grandparents and children, and that it was in the children's best interests for the relationship to continue, because a variety of witnesses testified as to the close, loving relationship between the grandparents and the minor children. *Id.* Although a mental health therapist testified that one of the children was afraid of the grandparents, the district court rejected this testimony as "not believable." *Id.* The trial court found by clear and convincing evidence that visitation with the grandparents would not adversely interfere with the parent-child relationship. *Id.* Even though the relationship between the mother and grandparents was strained, and although the mother did not encourage a relationship between the children and the grandparents, numerous witnesses testified that the grandparents did not display animosity toward the mother, were focused on spending time with the children, and complied with the mother's directions concerning the children's care. *Id.* The trial court granted the grandparents visitation on the first Saturday of each month and for seven consecutive days in the summer. *Id.*

The Nebraska Supreme Court in *Hamit* held that the district court's decision was constitutional under a strict scrutiny analysis because the district court did not abuse its discretion in finding that the grandparents proved the requirements of the grandparent visitation statutes by

clear and convincing evidence. *Id.* The court also found that the district court’s specific visitation award was constitutional, because the court did not abuse its discretion in awarding the specific visitation it granted to the grandparents. *Id.* Under *Hamit*, a trial court’s award of visitation to grandparents will be constitutional so long as the court properly finds that the grandparents have proven each element of the Nebraska grandparent visitation statutes by clear and convincing evidence. Notably, there does not appear to be a single published Nebraska case where the grandparent visitation statutes have been found to be unconstitutional as applied.

The District Court found that the Nebraska grandparent visitation statutes, as applied to the present case, are unconstitutional under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. (T21–27). In its Order, the District Court noted that it was undisputed that the Nebraska Supreme Court has held that the Nebraska grandparent visitation statutes are facially constitutional, and that courts in all subsequent published Nebraska cases have found the grandparent visitation statutes constitutional as applied. (T24). However, the District Court relied on the Illinois case of *Lulay v. Lulay*, 739 N.E.2d 521 (Ill. 2000) in support of its conclusion that “as applied in this case, the grandparent visitation statute is an unconstitutional infringement on the [Appellees’] fundamental liberty interest in raising their children.” (T24–26).

In *Lulay*, the Illinois Supreme Court held that the nonparent visitation statute at issue was unconstitutional as applied where a grandmother petitioned for visitation of the minor children, whose parents were divorced, shared joint custody of the children, and both opposed the grandmother’s proposed visitation. Although the facts of *Lulay* arguably bear a superficial similarity to the facts of the present case, *Lulay* is inapplicable to the present case for a variety of

reasons. Most importantly, the court in *Lulay* dealt with a nonparent visitation statute that differs markedly from the Nebraska grandparent visitation statute. The relevant portion of the Illinois nonparent visitation statute read as follows:

The court may grant reasonable visitation privileges to a grandparent, great-grandparent, or sibling of any minor child upon petition to the court by the grandparents or great-grandparents or on behalf of the sibling, with notice to the parties required to be notified under Section 601 of this Act, if the court determines that it is in the best interests and welfare of the child, and may issue any necessary orders to enforce such visitation privileges. Except as provided in paragraph (2) of this subsection (b), a petition for visitation privileges may be filed under this paragraph (1) . . . if one or more of the following circumstances exist:

- (A) the parents are not currently cohabiting on a permanent or an indefinite basis;
- (B) one of the parents has been absent from the marital abode for more than one month without the spouse knowing his or her whereabouts;
- (C) one of the parents is deceased;
- (D) one of the parents joins in the petition with the grandparents, great-grandparents, or sibling; or
- (E) a sibling is in State custody.

. . .

750 Ill. Comp. Stat. Ann. 5/607(b)(1) (West 2000). Thus, unlike the Nebraska statutes, the Illinois nonparent visitation statute at issue in *Lulay* allowed persons other than grandparents to seek

visitation, did not require a showing that a significant beneficial relationship exists between the grandparent and the child(ren), and did not require a showing that nonparent visitation will not adversely interfere with the parent-child relationship—all factors which the Nebraska Supreme Court found to be essential in upholding the constitutionality of the Nebraska statutes in *Hamit*. Notably, the Illinois nonparent visitation statute was struck down altogether as facially unconstitutional shortly after the *Lulay* decision. *Wickham v. Byrne*, 769 N.E.2d 1 (Ill. 2002). The facts of the *Lulay* case are thus irrelevant because the Illinois Supreme Court has held that there is no possible factual scenario where the nonparent visitation statute at issue would be constitutional.

Although not cited by the District Court in its Order, Appellees cited other cases from states besides Nebraska to argue that allowing grandparent visitation over the objection of both parents is unconstitutional. These other cases cited by Appellees are easily distinguishable from the present case. In the Alabama case of *Ex parte E.R.G.*, the Alabama Supreme Court declared the entire nonparent statute at issue facially unconstitutional; the facts of the *E.R.G.* case are thus irrelevant because the court held that there was no possible factual scenario where the statute would be constitutional. 73 So. 3d 634 (Ala. 2011). The Iowa Supreme Court in *Santi v. Santi* emphasized that its decision was based on the critical fact that the children’s parents were married and that the children came from “an intact nuclear family;” the minor children’s parents in the present case, in contrast, are divorced and the minor children thus do not come from an intact nuclear family. 633 N.W.2d 312, 321 (Iowa 2001). Similarly, the Oklahoma Supreme Court (prior to *Troxel*) emphasized in *Herbst v. Sayre (In re Herbst)* the importance of the facts that the children’s parents were married and had “an intact nuclear family,” and that the petitioning grandparent relied only

on a “vague generalization about the positive influence many grandparents have upon their grandchildren.” 971 P.2d 395 (Okla. 1998). In contrast, the children’s parents in the present case are divorced, and Suzette presented specific evidence regarding her significant beneficial relationship with the children. Finally, the Florida Supreme Court (prior to *Troxel*) in *Beagle v. Beagle* explained the importance of the fact that the minor children came from an “intact family,” and found the Florida nonparent visitation statute to be facially unconstitutional even where only one parent objects to grandparent visitation. 678 So. 2d 1271 (Fla. 1996). The position of the *Beagle* court is thus squarely at odds with the Nebraska Supreme Court’s holding in *Hamit* and inapplicable in the present case.

It is also worth noting that the statute does not specifically acknowledge nor address the issue of both parents objecting to visitation. In the present case, the District Court ruled that the Nebraska grandparent visitation statutes are unconstitutional as applied, without even finding whether the elements of the statute were satisfied. In so doing, the District Court created a rule that grandparent visitation will always be unconstitutional **per se** when both parents object to such visitation. Nebraska case law recognizes no such rule, and such a rule of unconstitutionality per se is in fact fundamentally at odds with Nebraska precedent. In every published Nebraska case, a grandparent who meets the requirements of the statutes has been deemed to meet *Troxel*’s constitutional requirements. The Nebraska grandparent visitation statutes cannot be satisfied without at least satisfying the constitutional commands of *Troxel*, because the elements of the grandparent visitation statutes apply the presumption that fit parents act in the best interests of their children, provide special weight to the parent’s decision concerning the denial of grandparent

visitation, and properly allow challenging grandparents to rebut the presumption that the parent's denial of visitation is in the children's best interests.

By summarily finding that the statute was unconstitutional *per se* because both parents objected, instead of analyzing whether Suzette met the requirements of the Nebraska grandparent visitation statutes, the District Court failed to properly evaluate the three principles articulated in *Hamit* which guide a court's analysis of whether a nonparent visitation statute, as applied, unconstitutionally infringes upon a parent's due process rights. The fact that both parents object to grandparent visitation is merely one of many facts to be considered in determining whether the Nebraska grandparent visitation statutes and the three principles articulated in *Hamit* are satisfied. By declaring the statutes unconstitutional *per se* merely because both parents objected, the District Court acted contrary to the Supreme Court's decision in *Troxel* and Nebraska case law. The District Court's Order of Dismissal must therefore be reversed, and this case must be remanded for further proceedings consistent with *Troxel* and Nebraska law.

CONCLUSION

For the above stated reasons, the District Court erred in dismissing Appellant's Petition to Establish Grandparent Visitation. Appellee respectfully requests this Court to reverse the District Court's Order of Dismissal and remand this matter for further proceedings.

Respectfully submitted,

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Certificate of Service

I hereby certify that on Sunday, January 02, 2022 I provided a true and correct copy of this *Brief of Appellant Suzette* to the following:

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